

## Challenging a deceased estate – have you missed out?

The *Administration and Probate Act 1958* (Vic) (the 'Act') allows the Court to make orders to provide for a claimant from the estate of a deceased person. This means that the Court may change a deceased person's Will or administration on intestacy to award a person funds or assets from the estate.

Family Provision Orders are distinct from challenging the validity of a Will which might arise in circumstances such as fraud or forgery, lack of mental capacity of the Will-maker, undue influence or lack of process. Rather, a family provision claim is a claim based on an alleged entitlement from somebody who has otherwise not been provided for or is insufficiently provided for under a Will or an intestate estate.

If you are considering making a family provision claim, strict time limits apply. Generally, a claim must be made within **six months** from the grant of probate or letters of administration (in the case of intestacy). The Court has discretion to extend this timeframe however it is often difficult to justify such an application and extensions are not readily granted. Obviously, an out of time claim will add to the cost and administration of bringing an application.

In determining a family provision claim the claimant must first fall within the eligibility criteria. Next the claimant must show that the deceased owed a moral obligation to provide for him or her and failed to do so. Finally, the Court considers a range of factors to determine whether the person will succeed in a claim and, if so, what adjustment should be made from the estate.

### **Who is eligible to make a claim?**

An applicant must be an 'eligible person', meaning:

- a spouse or domestic partner of the deceased at the time of the deceased's death;
- a former spouse or domestic partner of the deceased who at the time of death had not reached a property settlement with the deceased;
- a child or step-child of the deceased;
- a child, adopted child or step-child of the deceased who at the time of the deceased's death was a minor, full-time student aged between 18 and 25 years, or of any age and under a disability;
- a person, child under 18 years, student aged between 18 and 25 years or child under a disability, who for a substantial time believed that the deceased was his / her parent and was treated by the deceased as his / her natural child;
- a registered caring parent of the deceased;
- a grandchild of the deceased;

- a spouse or domestic partner of a deceased's child who dies within one year of the deceased's death;
- a member of the household of which the deceased was also a member (or a person who was previously a member and would have likely been a member in the near future).

### **The Court's powers to make an award**

The Court may order an award for family provision to an eligible person. A claimant must prove that, at the time of death, the deceased had a moral duty to provide for the claimant's proper maintenance and support and the distribution proposed under the Will or in administration failed to provide for this.

Certain categories of eligible persons face higher thresholds. An applicant who is a registered caring parent, grandchild, partner of a deceased's child who dies within one year of the deceased's death, or household member, cannot be awarded provision unless the Court is satisfied the person was wholly or partly dependent on the deceased.

In the case of an adult child or step-child who is not disabled, a full-time student under 25 years, or a person who believed the deceased was his / her parent and was treated accordingly, the Court must also consider the ability of that person to provide sufficiently for himself/herself.

### **Factors to be considered – a balancing act**

The Court will take into consideration the degree to which the deceased had a moral obligation to provide for the claimant and compare this with the proposed distribution (if any) from the estate.

The Court looks at the Will and any evidence regarding the deceased's intentions with respect to the claimant. The nature and length of the relationship between the claimant and the deceased, as well as the deceased's obligations to that person, any other person and the actual beneficiaries, are also considerations.

The size of the estate is relevant as are the needs, financial resources and earning capacity of the claimant. These factors are compared with those of any other eligible persons or the actual beneficiaries.

The liability of a third party to maintain an eligible person and the character and conduct of the eligible person is also considered.

The following examples show how the Courts have determined previous family provision claims.

***Example 1 – family provision awarded to adult step-son***

The claimant (step-son) was left out of his step-mother's Will. The claimant's late father was the second husband of the deceased. The deceased had inherited significantly under the claimant's father's Will. The father's Will provided for the deceased in the first instance and then to the claimant and niece of the deceased.

The deceased had no children and her most recent Will left her substantial estate to her niece and nephew.

The Court found that the step-son, who had modest assets, was 'dutiful and respectful'. There was no evidence that the deceased had a particularly close relationship to the niece and nephew (the main beneficiaries under her Will).

In all of the circumstances the Court found that the deceased had a moral duty to provide for the claimant and made a family provision order in his favour for 30% of the estate.

***Example 2 – further provision awarded to de facto partner***

The claimant and the deceased were in a de facto relationship spanning approximately eight years. The deceased died in 2008 and left a right of residency in his home and \$100,000 to the claimant.

The value of the deceased's estate was approximately \$1.5 million and the de facto partner claimed further provision. The application was opposed by the deceased's two children as executors of the estate.

In its determination the Court considered the nature of the relationship between the claimant and the deceased and the deceased's moral obligation to the claimant. In the circumstances, the Court amended the right of residency in the deceased's property to a trust in the sum of \$420,000 so the estate could purchase a modest residence in which the claimant would have a life tenancy (a greater interest than the right of residency). The legacy of \$100,000 was increased to \$198,000.

**Conclusion**

Family provision claims are complex with many factors taken into consideration. Legal advice should always be sought particularly given the strict time limits for making claims, the eligibility criteria and the factors the Court must consider in awarding a claimant.

Your lawyer can advise you on the potential of bringing such a claim and your likely chances of succeeding. If you believe you have been left out of a Will and would like a confidential discussion, please call us on (03) 9459 5764 or email [admin@rtlegal.com.au](mailto:admin@rtlegal.com.au).